No. 49659-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RONALD V. MA'AE, Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A.) The Legislature created the provider network to control the quality of treatment that injured workers receive, not to restrict a worker's access to the workers' compensation system.

The Washington Legislature's intent in creating the provider network is clear. In the preamble to RCW 51.36.010 the Legislature stated, "high quality medical treatment and adherence to occupational health best practices can prevent disability and reduce loss of family income for workers, and lower labor and insurance costs for employers. Injured workers deserve high quality medical care in accordance with current health care best practices." RCW 51.36.010 (2011). Nowhere in the statute did the Legislature say its intent was to restrict access to Title 51.

The Legislature signaled its intent to maintain quick access to the workers' compensation system by maintaining an injured worker's right to see non-network providers for an initial office or emergency room visit. Thus, a worker, who may be in an emergent situation, does not have to try to locate a network provider to get that treatment, and that provider can file the application in order to get the worker into the system as quickly as possible.

Contrary to the Department's assertion, filing a reopening application is **not** "treatment." The medical information filed in a reopening

application, with a few exceptions, is almost identical to the Report of Accident at the outset of the industrial injury/occupational disease claim. Essentially, the only difference between the two is that in a reopening application, the doctor asserts that the worker needs treatment for an industrially related condition that is causally related to a previously reported injury, rather than a new injury.

The Department has argued that a reopening application does not fall under the rubric of an "initial" visit because it happens after the claim is already allowed and so it is just another step in the continuing care of the worker. Perhaps that argument would work if an injured worker's claim was just "inactivated" for seven years after the claimant had been found to be at maximum medical improvement, and the worker would just have to return to see his attending doctor to say he was worse in order to get it "reactivated" again, but that's not what happens.

When an injured worker's claim is closed, that worker is no more a part of the workers' compensation system than a person who has never made a claim at all. If the worker believes that his industrially related condition has worsened, the worker must file an application to gain access to the workers' compensation system, just as a worker must do when he or she is first injured. Restricting the filing of a reopening application to only network providers restricts those workers' access to the system, and is,

therefore, contrary to the intent of Title 51 to "provide sure and certain relief for injured workers." RCW 51.04.010. But it is also contrary to the intent of the legislature that, while creating the provider network to ensure injured workers received good medical treatment, declined to restrict access to the system by maintaining a worker's right to see any provider for an initial visit.

Additionally, the Department continues to imply that because a worker has been treated for the injury previously necessarily means that an aggravation of that injury is not an emergency that requires immediate attention. However, just like the original injury, aggravations of industrial injuries run the entire spectrum from mild to life threatening. One cannot assume that just because a worker has previously been treated for an injury, that a reopening of that claim is necessarily a lesser event than the original injury. In fact, by its very definition, a claimant must be "worse" than when the claim closed in order to even apply for a reopening.

The Department asserts that Mr. Ma'ae's brief is "oblique as to whether filing a reopening application is an initial visit," (Respondent's Br. 19, footnote 8). This is incorrect. The very **basis** of Mr. Ma'ae's Petition for Judicial Review and Declaratory Judgment was his argument that the Department overstepped the authority granted to it by the Legislature when it unilaterally determined that reopening applications did not fall under the

aegis of "initial" visit. (Appellant's Brief 11-12). Mr. Ma'ae has argued from the outset that the Legislature's purpose in reinserting the language in SB5801 that maintained an injured worker's right to see a non-network provider for an initial office visit was to protect an injured worker's access to quick medical care. That right to quick access applies both to a worker who has been freshly injured as well as to a worker whose injury was thought to be resolved, but has worsened to the point where the worker needs to regain access to the workers' compensation system.

B.) The Department has not followed its own definition of the meaning of "initial visit" so it cannot cite to WAC 296-20-01002 as the authority on what initial visit means.

The Department cites WAC 296-20-01002's definition of "initial visit" as evidence that the Legislature intended for reopening applications to be filed only by network providers. However, the Department has only adhered to this definition of initial visit when it comes to some reopening applications and little else.

First, the term defined in WAC 296-20-01002 is "initial visit." However, in the amendment to RCW 51.36.010 the Legislature referred to their limitation for non-network providers as "an initial office or emergency room visit," rather than just "an initial visit," a subtle but important distinction because it adds the qualifier of office or emergency room.

Additionally, if the Legislature had intended to accede to that definition it could have simply said, "as defined in WAC 296-20-01002."

Second, the Department's rule making file has several instances where it had discussions about what "initial visit" meant. They discussed that it was not necessarily the "first" visit, and in fact had PowerPoints that were titled: "Initial ≠ First." (CP 74-80). And they also admitted that there was a trade-off in the legislative intent when they decided that they would pay non-network provider's for more than the "initial visit." "Legislative Intent trade-off: Some workers may receive extended care from non-network providers before insurer is aware of it." (CP 80). This acknowledges that the legislative intent of the amendment restricting non-network providers to an initial visit was to ensure that "**extended care**" was provided by network providers.

Third, the Department disregarded WAC 296-20-01002's definition of "initial visit" when it determined that non-network providers could provide follow-up care, maybe even weeks of follow-up care even though they were not network providers. (CP 82-85). The Department determined that an injured worker could go visit a non-network provider a second time after an initial visit as long as the Department didn't have to pay more for it. (CP 86). In fact, the Department's determinations about whether or not to include follow-up visits in the initial visit centered around the cost much

more than the quality of care. (CP 87). It decided that if it defined the initial visit as only the "accident report visit" it would cost a lot more and delay the adjudication of claims that they could easily open and close. It made this decision despite acknowledging that, consequentially, an injured worker would be delayed in seeing a network provider. In the Department's view, this delay in getting an injured worker to a network provider was low risk. (CP 87).

Finally, the Department doesn't even hold fast to its determination that only network providers can file reopening applications because it accepts reopening applications from out of state providers who are not members of the provider network. Mr. Ma'ae argued in his Petition for Judicial Review that the use of the article "an" rather than "the" in the amendment to RCW 51.36.010 signaled the Legislature's intent that there could be more than one initial visit. The Department has argued that "initial" is the important word because it means "first," and "only" is an important word because it means just "one exception." However, the Department's own Rulemaking file shows that "initial" does not mean "first" and "only" does not mean "one exception," because they have included pretty much every other exception to the definition of "an initial visit" except the one that affects Mr. Ma'ae.

C.) The filing of a reopening application is not "treatment" as contemplated under RCW 51.36.010, but an administrative function analogous to the filing of a report of injury.

The Department argues that because a doctor needs to examine a worker in order to file a reopening application, that examination falls under the rubric of "care" and so that is what was contemplated by the Legislature when it decided to "establish a health care provider network to treat injured workers." RCW 51.36.010(1). But the statement above, right out of the statute, is pretty straightforward. The health care provider network was established to "treat" injured workers.

Treatment is what happens once a worker has been determined to have an industrial injury. That's when the provider network comes into play, when it has been determined that Title 51 applies to that person. Again, the statement above is pretty straightforward, the provider network only applies to "injured workers." But a person is, necessarily, **not** an "injured worker" until it has been established that the injury is a result of the work. Prior to that the person is just a patient with a medical condition that alleges his or her condition was caused by work.

A person cannot get "treatment" from a member of the provider network until he or she has been determined to be an "injured worker" And they cannot be determined to be an "injured worker" until they apply for benefits and their claim is allowed. Similarly, a person is not an injured

worker for the purposes of getting treatment by the Department until the Department determines that an industrial injury that was previously reported has gotten worse and the claim needs to be reopened. Until the Department makes that determination the person is just a claimant with a medical condition, not an injured worker.

The filing of the application **is** "an administrative function." The Department mistakes the holding in *Tollycraft*. The Court's conclusion was not about the filing of the application for reopening, but about the Department's final determination that worsening had occurred. The mere filing of a reopening application does not result in an automatic reopening. The Court in *Tollycraft* explained,

> "**The administrative processing of an application to re-open under RCW 51.32.160 takes place in three stages. In the first, the injured worker files an application with the Department.** In the second, the Department determines whether the application to re-open meets the requirements of the statute. See WAC 296-14-420(1). If it does, the worker's claim is re-opened, and the process moves to the third stage where an evaluation of the worker's condition is made to determine the extent of the aggravation of the injury and the appropriate adjustment of benefits**. In the second stage, the decision of the Department to re-open a claim, is not merely a "paper" act.** It is, instead, a substantive decision by the Department that the injured employee has met the criteria of the statute to show aggravation.

Tollycraft Yachts Corp. v. McCoy, 122 Wn.2d 426, 858 P.2d 503 (1993) (Emphasis added).

As stated by the Court, the filing of a reopening application by a claimant is only the first step in an "administrative processing." The Department's determination of whether to reopen the claim is a separate and distinct act. Yes, documentation for reopening applications "may" serve as a gateway for more treatment as alleged by the Department. (Respondent's Br. 25). **All** applications for benefits, whether an initial report of injury/ occupational disease, or a reopening application may serve as a gateway for treatment. That's the point of the application.

Most troubling, however, is that the Department acknowledges that it is the claimant's burden to provide objective medical evidence of worsening, and that claimants are held "to strict proof of their right to receive the benefits provided by the Act." *Robinson v. Dep't of Labor & Indus.*, 181 Wn.App. 415, 427, 326 P.3d 744 (2014). (Respondent's Br. 24) If claimants have to **prove** their right to receive benefits for a worsening of their condition, the implication is that the Department's presumption is the claimant isn't worse. Yet the Department insists that to provide this medical documentation the worker can only go to doctors that the Department has hand selected and who have sworn to adhere to what the Department requires of them?

D.) The new Provider Network information cited by the Department in its brief is both inadmissible and irrelevant.

In its brief, the Department cites to its own updates on the Medical Provider Network. (Respondent's Br. P3, footnote 1 & 2, P25 footnote 9). This new information is both inadmissible under RCW 34.05.562 and RAP 9.11, and irrelevant to this Court's consideration of the issues.

The issue before this Court is a de novo review of the rulings of the Superior Court of Thurston County on Mr. Ma'ae's Petition for Judicial Review and Declaratory Judgment. Mr. Ma'ae has asserted that the Department exceeded the authority granted by the legislature under RCW 51.36.010 or acted in an arbitrary and capricious manner when it promulgated the change to WAC 296-14-400 that required that reopening applications only be filed by network providers. The number of doctors accepted or denied inclusion in the provider network is irrelevant to that issue because the network didn't exist at the time the Department took the actions that are under review.

RCW 34.05.562 New evidence taken by court or agency.

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, **only if it relates to the validity of the agency action at the time it was taken** and is needed to decide disputed issues regarding:
> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;

> (b) Unlawfulness of procedure or of decision-making process; or
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1) (emphasis added).

First, it violates the provisions of RCW 34.05.562 to introduce new evidence at the Court of Appeals that didn't exist at the time of the agency action. Because the provider network did not exist at the time of the Department's amendment of WAC 296-14-400, introducing statistics about the provider network's current membership is not appropriate.

> Rule 9.11 Additional Evidence on Review
>
> (a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.
> (b) Where Taken. The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

RAP 9.11

Second, RAP 9.11 "Additional Evidence on Review" cites the parameters for accepting new evidence that was not considered by the

Superior Court of Thurston County. Because it violates RCW 34.05.562, this new evidence, consequently, does not meet the criteria of RAP 9.11 and should not be considered.

Finally, the statistics provided, and the assertions made are inaccurate at best. Should the information provided in the cited links be taken under consideration by this Court, Mr. Ma'ae requests an opportunity to challenge that information in the form of declarations from numerous attorneys that have difficulty finding network providers to, not only, file reopening applications, but also to provide ongoing treatment; as well as an opportunity to dispute the veracity of the Department's statistics on the number of providers reportedly denied access to the network.

II. CONCLUSION

For the reasons stated above, Mr. Ma'ae respectfully requests that the Court reverse the trial court's October 20, 2016 order and rule that the Department incorrectly promulgated the WAC 296-14-400 requirement that only network providers can file reopening applications under Title 51 because it exceeded the statutory authority granted it by RCW 51.36.010, and/or the action was arbitrary and capricious under RCW 34.05.570(2)(c) and reverse and remand for the Department of Labor and Industries to take all proper and necessary actions consistent with the Court's findings and conclusions.

Respectfully submitted this 26th day of July, 2017.

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